JUDGE PRESKA

04 CV 0306

L. PETER PARCHER (LP 8096)
GREGORY A. CLARICK (GC 5898)
MONICA YOUN (MY 7636)
MANATT, PHELPS & PHILLIPS, LLP
A Professional Corporation
500 Fifth Avenue
New York, New York 10110
(212) 382-0200

Attorneys for Plaintiffs EMI April Music Inc., EMI Blackwood Music Inc., EMI Unart Catalog Inc., and EMI Virgin Songs, Inc.

RECEIVED
APR 21 2004
U.S.D.C. S.D. N.Y.
CASHIERS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EMI APRIL MUSIC INC., EMI BLACKWOOD MUSIC INC., EMI UNART CATALOG INC., and EMI VIRGIN SONGS, INC.

Plaintiffs,

-against-

ELECTRONIC ARTS INC.

Defendant.

Index No. 04cv03065(LAP)
ECF CASE

COMPLAINT

JURY TRIAL DEMANDED

Plaintiffs EMI April Music Inc., EMI Blackwood Music Inc., EMI Unart Catalog Inc., and EMI Virgin Songs, Inc. (collectively "EMI" or "Plaintiffs"), by their attorneys, Manatt, Phelps & Phillips, LLP, as and for their Complaint in this action, allege as follows:

Nature Of The Action

1. Defendant Electronic Arts Inc., ("EA" or "Defendant") is the most successful videogame company in the world. To boost the sales of its videogames, EA has engaged in widespread, systematic and willful infringement of EMI's valuable rights in numerous musical compositions. Without obtaining the requisite licenses from EMI, EA has incorporated into

certain of its videogames (the "Infringing Games")[1] sound recordings that embody copyrighted musical compositions that EMI owns, co-owns, administers or otherwise controls (the "Infringed Compositions"). EA released and continues to market, distribute, and sell the Infringing Games with full knowledge that it does not have the right to do so.

2. Accordingly, EMI brings this action to enjoin EA from marketing, distributing, or selling the Infringing Games and to obtain damages for EA's past infringement, in the amount, at EMI's election, of either (i) EMI's actual damages and the percentage of EA's profits attributable to its infringing activities, in an amount to be determined at trial, but believed to be tens of millions of dollars or (ii) statutory damages in the maximum amount permitted under applicable law with respect to each of the Infringed Compositions, as well as recovery of EMI's attorneys' fees, costs and pre-judgment and post-judgment interest.

The Parties

3. Plaintiffs EMI April Music Inc. and EMI Blackwood Music Inc. are Connecticut corporations and music publishers with their principal places of business located at 1290 Avenue of the Americas, New York, NY 10104. Plaintiffs EMI Unart Catalog Inc. and EMI Virgin Songs, Inc., are New York corporations and music publishers with their principal places of business located at 1290 Avenue of the Americas, New York, NY 10104. EMI is engaged in the business of publishing and administering musical compositions, and owns, co-owns, administers or otherwise has exclusive rights in the United States to control and administer, either in whole or in part, its musical compositions, including the Infringed Compositions.

[1] The Infringing Games consist of EA Madden 2004; EA NASCAR Thunder 2004; EA Tiger Woods PGA Tour 2004; EA NBA Live 2004; EA MVP Baseball 2004; EA Fight Night 2004; and EA NHL 2004.

4. Defendant EA is a Delaware corporation, with a principal place of business in Redwood City, California. Defendant is engaged in the business of developing and selling interactive entertainment software worldwide for videogame systems, personal computers and the Internet. EA has international subsidiaries located in Austria, Australia, Barbados, Brazil, Canada, China, Denmark, Finland, France, Germany, Hong Kong, Italy, Japan, Korea, the Netherlands, New Zealand, Norway, Portugal, Singapore, South Africa, Spain, Sweden, Switzerland, Puerto Rico, Taiwan, Thailand and the United Kingdom, which also are in the business of marketing, distributing and selling EA videogames.

5. According to EA's public statements, EA's revenues from the sale of its videogame products exceeded $2.5 billion for fiscal year 2003. In the year 2003, over twenty-two of EA's games, including three of the Infringing Games, achieved "platinum" status, selling more than one million units over the course of the year.

Jurisdiction and Venue

6. This is a civil action seeking injunctive relief and damages for copyright infringement under the Copyright Laws of the United States, 17 U.S.C. § 101, *et seq.*

7. This Court has exclusive jurisdiction over this action under 28 U.S.C. §§ 1331 and 1338(a), in that this action involves claims arising under the United States Copyright Act.

8. This Court has personal jurisdiction over Defendant because Defendant transacts business in the State of New York and has committed tortious acts both within and outside the State of New York causing injury in the State of New York. Among other things, Defendant has infringed the Infringed Compositions in the State of New York.

9. Venue in the Southern District of New York is proper under 28 U.S.C. § 1391 and § 1400(a) because Defendant is subject to personal jurisdiction in this District, and a substantial part of the events or omissions giving rise to the claim occurred in this District.

Factual Background

Defendant EA Uses Musical Compositions and Recordings To Market Its Videogames

10. Almost since their advent, videogames have used background music as "soundtracks" to set the tone and pace during game play and user menu interfaces. Until recently, videogame manufacturers, including EA, either created music in-house or licensed old recordings inexpensively from record labels' back catalogues to create these soundtracks. Historically, music publishers charged only nominal licensing fees for use of the musical compositions embodied in the recordings used in videogame soundtracks, or even provided use of the compositions *gratis*.

11. In August 2002, EA launched its EA Trax division – a marketing initiative designed to bring music to the forefront of EA's videogame sales strategy. Steve Schnur, Worldwide Executive of Music for EA, described the EA Trax initiative in an interview with the online magazine "Music 4 Games": "EA Trax recognizes that gamers are listening and that audio is an important part of the experience." Schnur went on to explain:

> The idea was conceived in an internal music brainstorm in that every title released by EA Sports, EA Games and EA Sports Big would become an event for gaming fans and music fans. *EA Trax would forever change the way the game sounded and the way the game would be played.*

(<http://www.music4games.net/n_eatrax.html>) (emphasis added).

12. As part of this strategy, EA began to select carefully new songs by famous or upcoming artists, producers or writers for its soundtracks, targeting a particular customer demographic and enhancing the gaming experience. Often the featured songs had not been released commercially before their release in the EA games. In some cases, EA even commissioned a popular artist, producer or songwriter to create a song for a particular EA game.

13. As Schnur stated in the "Music for Games" interview:

> The game has to be first and foremost, great, but the music as well has to be fresh. How it is used will make a better experience each and every time. Great films with great music leave you emotionally satisfied. This should be no different.

Under its new EA Trax initiative, EA uses its videogame soundtracks in various ways that go beyond traditional background music. Some games feature one of the soundtrack songs in an introductory music video to set the tone of the game. In some instances, a "chyron" listing the song name, artist, and record label will flash on the screen at the beginning of each song during menu interfaces or pauses in game play. Additionally, more recent games allow the player to select particular songs from the soundtrack to hear during game play.

14. The EA Trax marketing initiative was an instant success. A May 12, 2003 article in *Newsweek* describes the way in which EA has used hit music to sell its videogame NBA Street Vol. 2. The article quotes Wil Mozell, the producer of that game: "The first NBA Street was five white guys in Canada making a videogame. . . . This time, we wanted something relevant and credible, and we knew we couldn't do it alone." Thus, EA selected brand-new tracks by superstar hip-hop artists, such as Jay-Z and Nelly, to lend authenticity to the game. This marketing strategy generated enormous customer "buzz." On or about April 2, 2003, for example, the online magazine *Intensity* published a story titled, "NBA Street Vol. 2 soundtrack

list revealed!" This article included the title and artist information for every song on the game's soundtrack. (<http://www.intensity-magazine.com/news/755>)

15. EA's new music-oriented marketing strategy has provided consumers with an independent reason to buy its games. In fact, going beyond incorporating music into its game, EA packaged its videogame NBA Live 2003 with a companion compact disc containing the soundtrack. In another "Music 4 Games" interview, Schnur promoted the game's release with explicit reference to the soundtrack:

> Just look at NBA Live 2003 releasing next month. You will find the world's biggest hip hop and urban artists all contributing music, launching songs from their new albums, and participating in our marketing.

(<http://www.music4games.net/f_eatrax.html>)

16. EA also has tailored its website (<http://www.ea.com>) (the "EA Website") to its new emphasis on music. The EA Website prominently features a "Soundtrack" section for each of its games, including the title and name of the recording artist for each featured song. On the EA Website, an online visitor can listen to 60-second samples of each recording in a game's soundtrack. Upon information and belief, EA also manufactures and distributes promotional materials for its games (the "EA Promotional Materials") that prominently feature its videogame soundtracks. These promotional materials include, but are not limited to, promotional digital video discs ("DVDs") and CD-ROMs that EA distributes at industry tradeshows.

17. As the foregoing paragraphs 10-16 illustrate, the soundtrack of each of EA's games has contributed substantially to the success and popularity of the game, has been a crucial and integral part of EA's marketing and promotional strategy for its games, and has accounted

for a significant portion of the sales and ultimate profits that EA has derived from its games, including from the Infringing Games.

Defendant EA Infringes EMI's Copyrighted Compositions

18. Between April 2003 and December 2003, EA approached EMI and requested licensing information for certain musical compositions that EMI owns, co-owns, administers or otherwise controls, including for the Infringed Compositions. A list identifying each of the Infringed Compositions and the Infringing Game(s) in which it is incorporated is annexed hereto as Exhibit A. EMI has registered copyrights or has filed copyright registration applications with the U.S. Copyright Office for each of the Infringed Compositions.

19. In response to EA's requests for information, EMI provided EA proposed license terms for certain of the Infringed Compositions. EMI also contacted the authors of certain of the Infringed Compositions to request necessary permissions and clearances to license the Infringed Compositions. In some cases, because certain of the Infringed Compositions were so recently composed, the writers had not yet determined the allocation of songwriting credit for the Composition, so EMI's own share of the composition could not be determined. EMI did not issue a license to EA for any of the Infringed Compositions.

20. Despite the fact that EA had not obtained licenses from EMI for use of the Infringed Compositions, EA commercially released the Infringing Games – each of which incorporates and uses one or more of the Infringed Compositions in its entirety on the game's soundtrack – for public sale on or about the following dates: EA Madden 2004 on August 12, 2003; EA NASCAR Thunder 2004 on September 16, 2003; EA Tiger Woods PGA Tour 2004 on

September 22, 2003; EA NHL 2004 on September 23, 2003; EA NBA Live 2004 on October 14, 2003; EA MVP Baseball 2004 on March 9, 2004; and EA Fight Night 2004 on March 22, 2004.

21. Upon information and belief, since their release, three of the Infringing Games have achieved "platinum" status, i.e., EA has sold in excess of one million units: EA NBA Live 2004 (more than two million units), EA Madden 2004 (more than one million units) and EA Tiger Woods PGA Tour 2004 (more than one million units). EA has sold many hundreds of thousands of units of the other Infringing Games as well. EA has derived substantial profits from the sale of the Infringing Games – which sell at a suggested retail price of $49.99 per unit – in an amount to be determined at trial, but believed to be hundreds of millions of dollars.

22. Additionally, the EA Website "Soundtrack" sections for the Infringing Games include 60-second samples of the Infringed Compositions. EMI never has granted EA a license for use of the Infringed Compositions on the EA Website.

23. Further, upon information and belief, EA has used the Infringed Compositions in the EA Promotional Materials for the Infringing Games. EMI never has granted EA a license for use of the Infringed Compositions in the EA Promotional Materials.

24. On or about February 12, 2004 – well after EA had released all but two of the Infringing Games – EA sent EMI a letter requesting licenses for use of the Infringed Compositions in the Infringing Games.

25. EA's February 12th letter confirms EA's full and actual awareness that it had released the Infringing Games using the Infringed Compositions in wilful violation of EMI's rights without having received the requisite licenses from EMI.

26. On or about March 5, 2004, counsel for EMI notified EA by letter that its use of the Infringed Compositions without a written and fully executed license from EMI constituted infringement of EMI's rights. The March 5th letter formally withdrew and revoked any outstanding offer to EA to license any musical composition owned, in whole or in part, published and/or administered by EMI, including the Infringed Compositions.

27. EA continues its unlicensed activities with regard to the Infringed Compositions. In order to cause Defendant to cease its unlawful conduct and clear contravention of the copyright laws, Plaintiffs seek a permanent injunction prohibiting Defendant from using compositions owned, co-owned, administered or otherwise controlled by Plaintiffs in interactive software products, on the EA Website, or in EA Promotional Materials without a written and fully executed license from EMI. Plaintiffs further seek monetary damages for Defendant's infringement of the Infringed Compositions on the Infringing Games, the EA Website, and the EA Promotional Materials. awarding Plaintiffs, at their election, either (i) actual damages and the percentage of Defendant's profits attributable to its infringing activities, in an amount to be determined at trial, but believed to be tens of millions of dollars or (ii) statutory damages in the maximum amount permitted under applicable law with respect to each of the Infringed Compositions.

CLAIM FOR RELIEF
(Copyright Infringement, 17 U.S.C. § 101, *et seq.*)

28. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs 1 through 27 of the Complaint as if fully set forth herein.

29. Plaintiffs did not grant Defendant licenses for the use of the Infringed Compositions.

30. Defendant has used the Infringed Compositions in the Infringing Games, on the EA Website, and in the EA Promotional Materials without authorization, permission or consent by Plaintiffs. Defendant has derived substantial profits from the sale of the Infringing Games.

31. Defendant has manufactured, licensed, distributed, and/or copied the Infringing Games in the United States or committed other predicate acts of domestic infringement in order to enable foreign sales of the Infringing Games by EA's foreign subsidiaries. Defendant also has derived substantial profits from sales of the Infringing Games by its foreign subsidiaries.

32. A significant portion of Defendant's profits from the Infringing Games is attributable to its use of the Infringed Compositions on and in connection with the Infringing Games.

33. Defendant continues its unlicensed activities in the Infringing Games, on the EA Website and in the EA Promotional Materials with regard to the Infringed Compositions despite having been informed by EMI that EA must obtain a license for use of any musical compositions owned, co-owned, administered and/or otherwise controlled by EMI, including for the Infringed Compositions.

34. Defendant's unauthorized acts have occurred, are occurring and will continue to occur without Plaintiffs' permission, license, consent or authorization. Such acts, therefore, have constituted, constitute presently, and will continue to constitute, a deliberate and wilful infringement of Plaintiffs' copyrights in and to the Infringed Compositions.

35. Upon information and belief, by reason of Defendant's past and present infringement, as well as its anticipated future infringement, of Plaintiffs' copyrights in and to the Infringed Compositions, Defendant unlawfully has derived and will continue to derive revenue and profits from its infringing acts, and Plaintiffs has sustained and will continue to sustain substantial injury, loss and damage.

36. As a direct and proximate result of Defendant's acts of copyright infringement, Plaintiffs are entitled to damages and Defendant's profits pursuant to 17 U.S.C. §504(b), or alternatively to the maximum statutory damages in the amount of $150,000 with respect to each of the Infringed Compositions pursuant to 17 U.S.C. § 504(c).

37. Plaintiffs are additionally entitled to their attorney's fees and full costs pursuant to 17 U.S.C. § 505.

38. Defendant's conduct is causing, and, unless enjoined by this Court, will continue to cause Plaintiffs irreparable injury that cannot be fully compensated or measured in money damages. Plaintiffs have no adequate remedy at law and, pursuant to 17 U.S.C. § 502, are entitled to injunctive relief prohibiting Defendant from continuing to infringe Plaintiffs' copyrights in the Infringed Compositions and other musical compositions.

Prayer for Relief

WHEREFORE, Plaintiffs demand judgment as follows:

A. Permanently restraining and enjoining Defendant, its officers, agents, servants and employees, and all persons in active concert and participation with it, using or otherwise exploiting any of the Infringed Compositions or any other musical compositions that EMI owns, co-owns, administers or otherwise controls.

B. Awarding Plaintiffs, at their election, either (i) actual damages and the percentage of Defendant's profits attributable to its infringing activities, in an amount to be determined at trial, but believed to be tens of millions of dollars or (ii) statutory damages in the maximum amount permitted under applicable law with respect to each of the Infringed Compositions;

C. Directing that Defendant pay Plaintiffs the costs of this action and their reasonable attorneys' fees herein;

D. Awarding Plaintiffs pre-judgment and post-judgment interest on any monetary award; and

E. Granting Plaintiffs such other and further relief as the Court may deem just and proper.

Dated: New York, New York
April 21, 2004

MANATT, PHELPS & PHILLIPS, LLP

By: ______________________________
L. Peter Parcher (LP 8096)
Gregory A. Clarick (GC 5898)
Monica Youn (MY 7636)

A Professional Corporation
500 Fifth Avenue, 38th Floor
New York, New York 10110
(212) 382-0200

Attorneys for Plaintiffs EMI April Music Inc., EMI Blackwood Music Inc., EMI Unart Catalog Inc., and EMI Virgin Songs, Inc.

EXHIBIT A

EXHIBIT A

Infringed Composition	Infringing Game
CHAPTER FOUR	EA Madden 2004 EA NHL 2004 EA NASCAR Thunder 2004
FEELING THIS	EA Madden 2004
MAYHEM	EA Madden 2004
GIN AND JUICE	EA Madden 2004
I HATE EVERYTHING ABOUT YOU	EA NASCAR Thunder 2004
LITTLE KNOW IT ALL	EA NASCAR Thunder 2004
NOTHING SACRED	EA NASCAR Thunder 2004
BLUESIDE	EA Tiger Woods PGA Tour 2004
BONETHROWER	EA Tiger Woods PGA Tour 2004
GAME BEAT	EA NBA Live 2004
GOT IT POPPIN'	EA NBA Live 2004
LIVE LIKE ME	EA NBA Live 2004
TOP OF THE GAME	EA NBA Live 2004
LOVE AND WAR	EA NBA Live 2004
GET IT TO GO	EA MVP Baseball 2004
WALKIE TALKIE MAN	EA MVP Baseball 2004
HYPHY	EA Fight Night 2004
CRANK IT UP	EA Fight Night 2004
VICTORY	EA Fight Night 2004
FIGHTIN' IN THE CLUB	EA Fight Night 2004